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No. 87-19

In the Supreme Court of the United States

OCTOBER TERM, 1987

ROY F. WATTS, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DAVID M. COHEN
ROBERT A. REUTERSHAN
STEPHAN J. MCHALE
CAROL N. PARK-CONROY
Attorneys

Department of Justice
Washington, D.C. 20543
(202) 633-2217

HUGH HEWITT
General Counsel

EARL A. SANDERS
Attorney
Office of Personnel Management
Washington, D.C. 20415

QUESTION PRESENTED

Whether petitioner, who was employed by various proprietary corporations of the Central Intelligence Agency, was a person "appointed in the Civil Service" under 5 U.S.C. 2105(a) and therefore entitled to credit under the civil service retirement laws for the period of that employment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1-22) is reported at 814 F. 2d 1576. The final order of the Merit Systems Protection Board (MSPB) (Pet. App. B 1-3) and the initial decision of the MSPB administrative law judge (Lodging 1-54)[1] are unreported.

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[1] We have lodged with the Clerk of the Court ten copies of the full opinion of the MSPB administrative law judge. That opinion addresses claims for retirement credit by petitioner and two other individuals, and is captioned *Jerry Fink, et al.* v. *Office of Personnel Management.*

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1987. The petition for a writ of certiorari was filed on June 29, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In April 1947, petitioner was hired by the China National Relief and Rehabilitation Administration Air Transport (CNRRA), a privately owned airline. In 1950, the Central Intelligence Agency (CIA) acquired the CNRRA, and in 1959 the CNRRA was renamed Air America, Inc. Petitioner continued to work for Air America under contract until July 1961. Petitioner's initial contract was solely with the CNRRA, and he at no time executed any agreement with the CIA. When the CIA acquired the CNRRA, it simply assumed, without modification, petitioner's contract with the CNRRA. In the administrative proceedings below, petitioner conceded that he perceived no change in the nature of his duties after the CIA acquired the CNRRA. Pet. App. A 2-4; Lodging 30.

In October 1962, petitioner was hired by Intermountain Aviation, Inc. (Intermountain), another CIA proprietary corporation. At the time he was hired by Intermountain, petitioner executed an application that indicated that his employment was "for no definite period" and could "be terminated at any time without previous notice." When he first began working for Intermountain, petitioner was unaware of its connection with the CIA, although that fact later came to his attention. In 1966, petitioner resigned from Intermountain. At that time, the CIA offered him a GS-13 career appointment as a federal

employee, but he rejected that offer. Pet. App. A 4; Lodging 28-29.

In January 1974, petitioner applied to the CIA for retirement credit under the Civil Service Retirement Act (CSRA), 5 U.S.C. 8332, for the period of his service with the CIA proprietary corporations. The CIA referred the matter to the Bureau of Retirement, Insurance and Occupational Health (BRIOH) of the Civil Service Commission (CSC). In May 1974, the BRIOH denied petitioner's request. Petitioner then filed suit in district court. The court held that petitioner was entitled to a "full and fair hearing" before the "appropriate arm of the CSC." On remand, the Office of Personnel Management (OPM)[2] issued a final order denying petitioner's application. Pet. App. A 4-5; Lodging 3.

Petitioner appealed OPM's decision to the MSPB. In an initial decision dated March 10, 1983, the MSPB's administrative law judge (ALJ) rejected petitioner's arguments and denied his appeal (Lodging 1-54). The ALJ concluded that neither the CIA nor petitioner intended to effectuate a civil service appointment and that neither side considered petitioner to be a federal employee during the time he worked for the proprietary corporations (Pet. App. A 5-6; Lodging 29-32). In summarizing the evidence, the ALJ stated (Lodging 32) that "Mr. Watts' own presentation makes it abundantly clear that,

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[2] Under the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, the CSC was abolished, and administration of the CSRA was vested in OPM. See 5 U.S.C. 8347(a) and (b). Authority to adjudicate administrative appeals from OPM's retirement decisions was vested in the MSPB. See 5 U.S.C. 8347(d); see generally *Lindahl* v. *OPM*, 470 U.S. 768, 773-774 (1985).

regardless what the status of others may have been, neither he nor anyone else, during the years in question, considered him to be a federal employee, appointed to or hired for a federal government position." The ALJ noted (*id.* at 29-30) that petitioner "present[ed] no evidence whatsoever tending to show that any of his superiors had any understanding or intention of appointing him to a federal position" and that "he never believed, nor was he given cause by his superiors to believe, that he was occupying a federal position."

In deciding that petitioner was not a federal employee, the ALJ applied a standard that was more favorable to petitioner than the one urged by the government. OPM maintained (Mot. for Summary Judgment 19) that "a formal or documented appointment is mandatory and that there can be no constructive or implied appointment." The ALJ, however, ruled (Lodging 16-19, 51) that no particular formality was required and that the real issue was whether the parties intended to effectuate an appointment to the civil service.

On January 11, 1985, the full MSPB denied petitioner's request to reopen and reconsider the ALJ's decision (Pet. App. B 1-3).

2. The court of appeals affirmed (Pet. App. A 1-22). Relying largely on its decision in *Horner* v. *Acosta*, 803 F.2d 687 (1986), it held that "in the absence of formal or even intended appointment, [petitioner] is not an 'employee' for purposes of the civil service system" (Pet. App. A 8). The court emphasized (*id.* at 15) that petitioner never executed any "standard form or document creating a nexus between him and the government, was never given an oath of office, and was not aware of the CIA's in-

volvement until after his employment contract was executed." The court also noted (*id.* at 16) that petitioner's rejection of the CIA's offer of employment "implies that both he and the CIA correctly did not consider that he was already in the civil service."

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

1. It is well established that an individual does not hold a position as a federal "employee" unless and until he is appointed to that position. See generally *United States* v. *Testan*, 424 U.S. 392, 402 (1976) (citations omitted) ("The established rule is that one is not entitled to the benefit of a [government] position until he has been duly appointed to it."); *United States* v. *Smith*, 124 U.S. 525, 532 (1888); *United States* v. *Mouat*, 124 U.S. 303, 307 (1888); *Baker* v. *United States*, 614 F.2d 263, 267-268 (Ct. Cl. 1980); *Goutos* v. *United States*, 552 F.2d 922, 924 (Ct. Cl. 1976).

In 1966, Congress codified the principle that federal "employment" arises only by way of an appointment. Under 5 U.S.C. 8332(b), service as an "employee" is entitled to retirement credit for purposes of the CSRA. Section 8331(1)(A) defines "employee," inter alia, by reference to 5 U.S.C. 2105(a) (emphasis added), which in turn provides:

> For the purpose of this title, "employee," except as otherwise provided by this section or when specifically modified, means an officer and an individual who is—

(1) *appointed in the civil service* by one of the following acting in an official capacity—

(A) the President;

(B) a Member or Members of Congress, or the Congress;

(C) a member of a uniformed service;

(D) an individual who is an employee under this section;

(E) the head of a Government controlled corporation; or

(F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

The courts have repeatedly held that all three of the elements of Section 2105(a) must be met for an individual to qualify as a federal employee. See, *e.g.*, *Horner* v. *Acosta*, 803 F.2d at 691-692; *Costner* v. *United States*, 665 F.2d 1016, 1020 (Ct. Cl. 1981); *National Treasury Employees Union* (*NTEU*) v. *Reagan*, 663 F.2d 239, 246 (D.C. Cir. 1981); *Baker*, 614 F.2d at 268.[3]

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[3] Section 2105(a) was enacted in 1966 as part of the revision of Title 5. Pub. L. No. 89-554, 80 Stat. 409. The legislative history makes clear that that section did not modify the substantive requirements for establishing federal "em-

In the present case, the court of appeals simply applied the requirement of Section 2105(a) that to qualify as an employee, the person must have been "appointed in the civil service." The evidence conclusively established that neither petitioner nor the CIA intended to effectuate a civil service appointment to any of the positions that petitioner held in the proprietary corporations (see Lodging 32). As the court of appeals noted (Pet. App. A 15), petitioner never executed any form or document evidencing an appointment, was never given an oath of office, and was not even aware of the CIA's involvement with the corporations until after they had hired him (*ibid.*). Moreover, the CIA's offer of civil service employment to petitioner in 1966, and petitioner's rejection of that position, further suggests that neither side previously viewed him as already being in the civil service (*id.* at 16).

2. Petitioner contends (Pet. 17) that review by this Court is appropriate because of the court of appeals' "extremely formalistic approach to the issue of 'appointment.'" According to petitioner (Pet. 29), the appointment requirement should be interpreted "pragmatically."

In our view, the Federal Circuit correctly articulated the criteria for determining the existence of a federal appointment. The court did not hold that any specific formality or documentation was required in every case. Rather, it simply held (Pet. App. A 15-

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ployee" status. See, *e.g.*, H.R. Rep. 901, 89th Cong., 1st Sess. 3, 27 (1965). Petitioner appears to concede (Pet. 26-27) that since Section 2105(a) merely codified prior law, the issue in this case involves the proper interpretation of Section 2105(a), even though he is claiming coverage for a period pre-dating the enactment of Section 2105.

16) that "[t]he essential prerequisites are an authorized appointing officer who takes an action that reveals his awareness he is making an appointment in the United States civil service, and action by the appointee denoting acceptance." Thus, petitioner errs in characterizing the court's approach as "extremely formalistic" (Pet. 17). Moreover, the ALJ in this case took an even less formal approach to employment than that adopted by the Federal Circuit (see Lodging 16-19, 51), yet he too found that petitioner failed to qualify because of the absence of any evidence that either side intended to effect an appointment (*id.* at 29-30).

To be sure, the court of appeals did reject petitioner's contention "that an individual can become a federal employee in a passive manner without appointment, or with appointment only to the service of a private carrier, and even without an awareness at the beginning of the contractual relationship, of the involvement of the government" (Pet. App. A 16-17). But the court's holding is plainly correct and does not warrant review by this Court. Petitioner's approach would render the concept of appointment meaningless. Nothing in the text or history of Section 2105(a) supports such an approach.[4] As one

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[4] Petitioner contends (Pet. 29-30) that under this Court's decision in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), formal documents establishing an appointment are unnecessary. In *Marbury*, however, all formal acts and documents necessary to effect the appointment were fully executed. The issue involved the significance of the fact that the commission had not been delivered to Marbury. The Court's decision in no way supports a conclusion that Marbury could have been deemed appointed without compliance with all of the required acts and without the issuance of the re-

court aptly noted, eliminating the appointment requirement "would create the potential for 'chaos in government personnel management' by introducing uncertainty into the federal employment process to the confusion of employer and employee alike, not to mention the public * * *." *Curran* v. *OPM Bureau of Retirement, Ins. and Occupational Health*, 566 F. Supp. 1511, 1514 (D.D.C. 1983) (citation omitted), aff'd, 735 F.2d 617 (D.C. Cir. 1984).

3. Petitioner argues at some length (Pet. 18-27) that the proprietary corporations were "government corporations." That argument, however, is simply irrelevant in this case. One may work for a government corporation without being "appointed in the civil service." Petitioner's assumption that the statutory requirement of appointment in the civil service does not apply if a person is hired by a "government

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quired documents. Indeed, petitioner himself concedes that *Marbury* "stress[ed] the need for formalities" (Pet. 30).

Petitioner also errs in relying (Pet. 29-30 n.3) on *NTEU* v. *Reagan*, 663 F.2d 239 (D.C. Cir. 1981), and on *Beacom* v. *EEOC*, 500 F. Supp. 428 (D. Ariz. 1980). Neither case held or implied that an appointment was unnecessary for an individual to become a federal employee. The only question before the courts concerned the documentation required to effect the appointment. In both cases, the individuals concerned had been issued selection letters notifying them that they would commence duties in identifiable federal positions as of specific dates. And in both decisions, the selection letter was held to be sufficient to effect an appointment. See *NTEU*, 663 F.2d at 245-246; *Beacom*, 500 F. Supp. at 434-435. Neither case addressed the question whether the service of individuals retained in a manner other than through the agency's usual formal appointment procedures could constitute service as an "employee" within the meaning of 5 U.S.C. 2105(a).

corporation" is illogical and unsupported by authority.

In any event, petitioner errs in asserting that the CIA proprietary corporations involved in this case constituted "government corporations." Petitioner relies (Pet. 24-26) primarily on a predecessor statute to the one involved here, the Federal Executive Pay Act of 1956 (the Pay Act), 5 U.S.C. (1958 ed.) 2251(a) and (k). Section 2251(k) defined the term "Government," for purposes of civil service retirement laws, as including "Government-owned or controlled corporations." And Section 2251(a) defined "employee" as "a civilian officer or employee in or under the Government * * *." But the Pay Act did not define the term "Government-owned or controlled corporation," and the legislative history of that Act established that, where a term was not defined, Congress intended merely to adopt prior law, including previous administrative rulings issued by the CSC. See S. Rep. 2642, 84th Cong., 2d Sess. 4 (1956) (stating that various terms in the Pay Act contained statutory definitions or references to definitions and that "[i]n other instances, regulations, precedent, and administrative rulings are relied upon for the meaning of the terms used"); 102 Cong. Rec. 8655 (1956) (remarks of Sen. Johnston) (noting that the term "Government," as defined in the bill, "is intended to apply to exactly the same employees—no more, no less—covered under present law").

A ruling issued by the Commissioners of the CSC prior to the enactment of the Pay Act severely restricted the types of corporations whose employees are eligible for service credit under the civil service retirement laws. Specifically, Minute 4 of May 13, 1936, reprinted in Gov't C.A. Br. App. 56, provided that service is "accreditable for retirement" only in

(1) "[c]orporations created by Federal statute which specifically requires that the majority of the stock of the corporation be at all times owned by the United States" or (2) "Federal corporations the directors and officers of which are all appointed in the same manner as Federal officials are appointed, including any Federal officers ex officio in this category." [5] The CIA proprietary corporations involved here do not qualify in either of the two categories.

4. Petitioner also asserts (Pet. 47-50) that the decision of the court of appeals was "tainted" by "speculation" concerning the potentially broad implications of his theory. That claim is frivolous. The court of appeals was entirely correct in recognizing (Pet. App. A 8) that petitioner's open-ended approach to the concept of appointment could result in the addition of civil servants in "numbers unknown, and without thought as to their effect on [the] actuarial soundness of the retirement fund." The court's observations in no way undermine its detailed and careful analysis of the issues presented. Rather, its statements only confirm the lack of merit in petitioner's attempt to circumvent the plain language of Section 2105(a). Had Congress intended such a far-reaching impact on the civil service system and the federal treasury, it plainly would have said so.[6]

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[5] CSC Minutes have been cited by this Court and other courts as authoritative sources of the CSC's position on various legal and policy issues. See, *e.g.*, *Elder* v. *Brannan*, 341 U.S. 277, 284 n.2 (1951); *Ellsworth* v. *Maher*, 257 F.2d 221, 222 n.1 (D.C. Cir.), cert. denied, 358 U.S. 839 (1958); see generally 5 U.S.C. 1307 (directing the CSC to keep minutes of its proceedings).

[6] Petitioner's remaining claims likewise lack merit. Petitioner contends (Pet. 35-37) that an agency policy statement —Federal Personnel Manual (FPM) Supp. 831-1 (originally

issued in 1963)—nullified the "appointment" requirement of 5 U.S.C. 2105(a) for purposes of establishing creditable "employee" service under the CSRA. Relying on its prior decision in *Horner*, 803 F.2d at 694-696, however, the court below correctly rejected petitioner's claim. The FPM Supplement provision (which was rescinded in March 1985) provided, in relevant part, that "[s]ervice rendered under special contract may [subject to specified exceptions] be credited if the contract contemplates full-time or specified part-time personal service of the person obligated by the contract under the daily supervision and control of a Federal official, or if the periods of actual service made of record are computable." See *Horner*, 803 F.2d at 690 n.4. To the extent that this provision could have been interpreted to provide that an individual could be an employee without satisfying the statutory "appointment" requirement, it was plainly in conflict with 5 U.S.C. 2105(a) and with other authorities requiring an appointment, and thus, contrary to petitioner's contention (Pet. 40-43), it was not entitled to deference and could not be enforced. See, *e.g.*, *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), slip op. 23-27.

Petitioner also asserts (Pet. 37-38) that under OPM's regulations (5 C.F.R. 831.201(a)(5)), all personal services contracts must be considered "appoint[ments] in the civil service" within the meaning of 5 U.S.C. 2105(a)(1). The plain language of the regulation refutes that contention. The regulation provides, in relevant part, that "[e]mployees paid on a contract or fee basis" are excluded from retirement coverage, with the exception of those employees "who are *appointed* by contracts between the employees and the Federal employing authority which require their personal services and are paid on the basis of units of time" (emphasis added). By limiting the scope of coverage to those persons who are *appointed* by contracts, the regulation clearly does not apply to contracts between individuals and a federal agency in which "appointments" were not made. Cf. *United States* v. *Hopkins*, 427 U.S. 123, 129-130 (1976) (differentiating between employment by appointment and employment by contract without an appointment).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DAVID M. COHEN
ROBERT A. REUTERSHAN
STEPHAN J. MCHALE
CAROL N. PARK-CONROY
Attorneys

HUGH HEWITT
General Counsel

EARL A. SANDERS
Attorney
Office of Personnel Management

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